

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Plaintiff,

v.

RODRIGO KEDE DE FREITAS LIMA,

Defendant.

20 Civ. \_\_\_\_\_

**COMPLAINT**

International Business Machines Corporation (“IBM” or the “Company”), by its undersigned attorneys, upon personal knowledge with respect to itself and its actions and otherwise on information and belief, alleges as follows:

**Nature of the Action**

1. In violation of his one-year Noncompetition Agreement with IBM, as well as the common law duties he owes to IBM, Defendant Rodrigo Kede de Freitas Lima (“Lima”) has resigned as a senior executive of IBM to immediately become a senior executive at one of IBM’s biggest competitors, Microsoft. Even though his experience and contacts at companies in virtually every sector of the economy qualify him to work for all kinds of businesses, Lima wants to become a direct competitor of IBM, starting this week. That, he cannot do.

2. Lima was among the top 1% of IBM’s highest ranking executives, with a seat at the table alongside the Chairman and Chief Executive Officer of the Company in exclusive senior executive strategy sessions and in a recent meeting of the Board of Directors setting the strategic direction of the Company. Over the years, Lima had responsibility for overseeing IBM’s Latin America operations, running IBM’s Global Technology Services business in North America, and managing IBM’s largest customer relationships across all of

IBM's businesses. Unbeknownst to IBM, however, Lima was in talks *for over a year* with Microsoft while continuing to be entrusted with some of IBM's most competitively sensitive strategic secrets -- many directly related to competing against Microsoft.

3. IBM heavily invested in and supported Lima's career and advancement. But despite being afforded every opportunity to succeed at the highest levels of IBM -- with access to highly valuable IBM trade secrets -- Lima's performance did not match the Company's expectations, or even his own ambitions. Now, Lima is violating his Noncompetition Agreement by seeking immediate employment at the highest levels of Microsoft, where he cannot avoid exploiting his IBM client relationships, and using his knowledge of IBM confidential business plans, to face off against IBM.

4. To prevent precisely that harm to IBM, Lima agreed that he would not leave IBM to work for a competitor without waiting at least 12 months. IBM brings this action to enforce that agreement, and seeks injunctive relief to prohibit Lima from breaching his Noncompetition Agreement and from threatening to use IBM's trade secrets or customer goodwill against IBM.

5. Given his wealth of knowledge about IBM's secret competitive strategies, product development projects, and acquisition plans, Lima poses a real and immediate threat to IBM. He was a "Band A" executive—the highest rank at IBM below the Senior Vice President level. He also was a member of IBM's Performance Team, an exclusive group of about sixty high-ranking executives, including the Chairman, CEO, and Senior Vice Presidents, who are responsible for the operational performance of the entire company. And he was a member of IBM's Acceleration Team, a select group of executives that accelerates IBM's growth through leadership initiatives to promote innovation.

6. In recent years, Lima ascended to the top executive leadership of the Company. Since January 2020, as General Manager, IBM Integrated Accounts, Lima was responsible for overseeing all aspects of IBM's 77 largest, most valuable, and most strategic customer accounts across all IBM business lines and regions. Lima was responsible for knowing highly confidential details about the current status of IBM's business with these accounts (e.g., pricing, strengths and weaknesses, renewal timelines) and IBM's future plans for these customers (e.g., targeted product development and launch plans, sales opportunities).

7. In 2019, Lima was the leader of IBM's Global Technology Services business ("GTS") for all of North America, making him privy to IBM's global (and confidential) strategies for competing against Microsoft and others in the information technology business. And in 2016, Lima was IBM's General Manager of Latin America -- essentially the same role that Lima plans to commence immediately at Microsoft. So Lima is going back to running Latin America, but this time for IBM's competitor, now armed with all of IBM's trade secrets he was exposed to in running IBM's GTS and Integrated Accounts businesses and participating on the Performance Team and Acceleration Team.

8. As one of the leaders of IBM, Lima generated and learned numerous IBM trade secrets. These are just some:

- IBM's launch plans and roadmap for new products and services in development, including a new suite of Cloud computing offerings for customers in the financial services industry;
- IBM's competitive strategies in bids for business where IBM competes head-to-head against Microsoft to win customers, including in large business and government accounts;
- IBM's projected profits and revenues, pricing strategies, strengths and weaknesses, and key opportunities with respect to the Company's top 77 customer accounts across all business lines, as well as the key individuals

at each client account involved in managing the business that client provides to IBM or its competitors;

- IBM's business, financial, growth, and investment plans for its global business over the next 12 months; and
- IBM's acquisition strategies, including IBM's plans to integrate and deploy capabilities of Red Hat, Inc., the Cloud computing company IBM acquired in 2019.

9. In addition to all that, Lima used IBM's invaluable goodwill to cultivate deep relationships with IBM's biggest customers in Latin America -- the same Latin American customers Microsoft targets for its own business. If he is not enjoined from becoming Microsoft's Corporate Vice President for Latin America, Lima will be responsible for running Microsoft's business that markets to those same customers.

10. It will be Lima's job to devise and implement Microsoft's plans for competing head-to-head with IBM for corporate, banking, insurance and other enterprise customers. To do that job, it is inevitable that Lima will use and rely on his IBM confidential information and customer relationships, to the direct detriment of IBM and for the benefit of its competitor Microsoft.

11. Given the overlap between Lima's former IBM responsibilities and his expected responsibilities at Microsoft, it is unavoidable that he will exploit and even divulge IBM's trade secrets, as well as his confidential information about IBM's customers. Furthermore, his proposed role at Microsoft will require him to develop and implement Microsoft's competitive strategy in the region, using the confidential information and customer goodwill he possesses concerning IBM customers in Latin America.

12. This is the very harm IBM sought to prevent when it elevated Lima to the senior leadership of the Company and asked him to make a simple promise: not to take a

competitive position or solicit his IBM customers for 12 months after leaving. Lima was trusted to keep that promise, and was handsomely compensated, in exchange for using IBM's trade secrets for IBM's business. IBM paid Lima over \$4 million in compensation and equity over his last five years, further supported Lima by paying for him to participate in external leadership programs, and even committed to sponsoring Lima's United States permanent residency application -- all as part of IBM's investment in what IBM expected would be a long-term relationship with Lima as a senior executive of the Company developing and protecting IBM's trade secrets. Yet Lima now intends to turn around, breach his Noncompetition Agreement, and put those trade secrets to work for Microsoft.

13. Lima should be directed to comply with his noncompetition agreement, enjoined from accepting the position at Microsoft without first waiting 12 months, and ordered to pay the damages suffered by IBM. In addition, IBM seeks to recover the equity IBM paid Lima that is subject to rescission as a result of Lima's breaches of his contractual duties to IBM.

### **Parties**

14. IBM is a New York corporation with its principal place of business in Armonk, New York.

15. Lima is a citizen of Brazil who, on information and belief, resides in Riverside, Connecticut.

### **Jurisdiction and Venue**

16. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is diversity of citizenship between the parties and the amount in controversy exceeds the sum of \$75,000, exclusive of costs and interest.

17. The Court has personal jurisdiction over Lima because, in the Noncompetition Agreement (attached hereto as **Exhibit A**), he agreed to exclusive jurisdiction

and venue in the federal and state courts of the State of New York, New York County or County of Westchester, for all disputes arising from the agreement. (2019 Noncompetition Agreement § 13.)

18. Venue properly lies in this Court both because of Lima's aforementioned agreement, and pursuant to 28 U.S.C. § 1391, because IBM's headquarters are in this judicial district and a substantial part of the events giving rise to the claims occurred in this district.

### **Relevant Facts**

#### **IBM**

19. IBM is a globally integrated business that offers information technology ("IT") products and services to a wide range of business, Public sector, and individual customers.

20. IBM designs, develops, and markets a portfolio of software products and services for customers in all industries, including (1) Hybrid Cloud, which offers businesses and government entities infrastructure, services, and tools for integrated Cloud computing; (2) Cognitive Solutions, which provides Artificial Intelligence ("AI")-based software and services to clients; (3) Global Technology Services, which provides assistance to companies and government entities in assessing, designing, implementing, and running their computer infrastructure and network systems; (4) Global Business Services, which offers professional management and strategic consulting services as well as systems integration, and application management services, to help clients use and integrate technology into their businesses; (5) Enterprise Server and Storage Systems, which offers clients a wide range of data storage products, data protection services, and IT infrastructure hardware such as computer servers; and (6) IBM Blockchain, which offers clients a suite of Cloud-based services to help clients create and manage blockchain networks.

21. Cloud computing is one of the areas of the most intense competition between technology companies like IBM and Microsoft. It refers to the delivery of on-demand computing resources—everything from applications to data storage—over the internet, generally on a pay-for-use basis. Cloud computing enables individuals, businesses, and Public sector entities to access, store and use data and software via the internet on computer servers owned and/or managed by third-party “Cloud” service providers—such as IBM, Microsoft, and Amazon—and pay for that service based on usage.

22. Clients procure Cloud computing services in three main sectors: Private Cloud, Public Cloud, and Hybrid Cloud. Private Cloud computing, also referred to as an internal or corporate Cloud, is a Cloud computing environment offered only to select users, usually a single organization, either through secure access over the internet or over a Private internal network.<sup>1</sup> In contrast, Public Cloud computing services are offered to the general Public, either for free, or for a fee, over the internet.<sup>2</sup> Hybrid Cloud computing allows data and applications to be shared across two or more cloud environments—environments that could include a combination of Private Cloud and Public Clouds.<sup>3</sup>

23. IBM relies on trade secrets, other confidential information, and proprietary methods and processes in developing, implementing and marketing its products and services offerings, and each year it spends billions of dollars and dedicates extensive research efforts to the development of technological innovations supporting its hardware, software and services

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<sup>1</sup> IBM Cloud Education, *Private Cloud* (April 10, 2010), <https://www.ibm.com/cloud/learn/introduction-to-Private-cloud>.

<sup>2</sup> IBM Cloud Education, *Public Cloud* (March 3, 2010), <https://www.ibm.com/cloud/learn/Public-cloud>.

<sup>3</sup> Red Hat, *Cloud Computing: what is Hybrid cloud?* (last visited June 15, 2020), <https://www.redhat.com/en/topics/cloud-computing/what-is-Hybrid-cloud>.

businesses. Among other things, IBM utilizes trade secrets, proprietary information and methods, confidential technical know-how, competitively sensitive customer and distribution information and confidential competitive strategies to design, develop, manufacture and bring to market a variety of products and services relating to technology infrastructure systems.

24. In order to protect its trade secrets, IBM asks a select group of its executives to enter into noncompetition agreements by which they promise that if they leave the Company, they will wait 12 months before joining a competitor in a position where they may use, disclose, or rely on IBM trade secrets and confidential information, or exploit IBM customer goodwill in their possession.

**Lima's Extensive Knowledge of IBM's Confidential Plans, Strategies and Clients**

25. Lima is a longtime IBM employee—he started working at IBM in February 1995, and other than a six-month departure from the Company in 2015, he has worked continuously for IBM in various roles for 25 years. In 2012, Lima was promoted to the role of General Manager, Latin America, where he was responsible for among other things, revenues, profits and losses, overseeing all aspects of customer accounts and business development, managing operations, and developing and implementing business strategy across the region.

26. On August 6, 2013, while he was in the role of General Manager, Latin America, Lima signed his first Noncompetition Agreement with IBM. In 2015, Lima resigned from that position at IBM to work for a Brazilian software company. Upon leaving IBM in 2015, Lima entered into a Noncompetition Settlement Agreement with IBM.

27. Lima rejoined IBM in January 2016 as General Manager of Latin America. When he accepted this role, he executed a new Noncompetition Agreement with IBM. In 2017, he became the GTS Manager, North America. This was a promotion to a “Band A”



executive role—meaning that Lima was among the top 1% of executives at IBM.<sup>4</sup> Lima worked in this role for nearly three years through December 2019. On December 3, 2019, when he became a U.S.-based employee, Lima executed a new Noncompetition Agreement with IBM (attached hereto as **Exhibit A**). In January 2020, Lima became General Manager, IBM Integrated Accounts, another Band A position, responsible for IBM’s largest and most strategic client accounts.

28. In his last five years at IBM, Lima received over \$4 million in compensation and equity from the Company. Further, throughout his career, IBM has invested in Lima by supporting his professional development, providing him the opportunity to participate in a leadership development program with executives from other leading companies. IBM also committed last year to sponsoring Lima’s United States permanent residency.

29. In his most recent role as General Manager, Integrated Accounts, from January 2020 until his resignation in May 2020, Lima was responsible for operationally running and growing the global portfolio for IBM’s 77 top client accounts across all of the Company’s business lines. In this position, Lima directed and oversaw the development and execution of IBM’s strategy for winning new contracts for IBM products and services, securing renewals and expansion of existing contracts, marketing, product development, and delivery and implementation. The products and services that IBM provides for these clients span all of IBM’s business lines, including software, hardware, services, Cloud computing and AI. This work exposed Lima to IBM confidential information and trade secrets about IBM’s top client

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<sup>4</sup> IBM employees with letter Bands (beginning at Band D and rising to Band A and AA) are IBM executives, and IBM employees with number Bands (beginning at Band 1 and rising to Band 10) are non-executives. Band A and AA executives are the highest ranking executives in the Company.

accounts, including IBM's strategies for maintaining and growing business in those accounts; the strengths, perceived weaknesses, and opportunities for improvement in the service of those accounts; and new sales or renewal opportunities in those accounts.

30. Prior to January 2020, Lima was IBM's GTS Manager for North America. In that role, he was responsible for, among other things, driving product sales in North America, primarily through IBM's GTS business focused on Cloud computing and other IT infrastructure services, but also with respect to all other business areas of IBM. As a result, Lima has in-depth knowledge about IBM's products that are in development, such as the one of a kind financial services Public Cloud, as well as marketing and business plans—further increasing the risk to IBM if he is permitted to simply defect to Microsoft.

31. Lima also was exposed to IBM's global strategic business, financial, growth, and investment plans, which IBM is implementing at a regional level in Latin America and elsewhere, through his participation in numerous senior executive discussions and meetings:

- (a) Lima participated in a September 2019 IBM Board of Directors meeting detailing the global strategy for the Company's business in the months and years to come, and he developed and reviewed materials for IBM's annual business plans, projections, and strategies that were presented to the Chairman and CEO of the Company.
- (b) Lima was a member of IBM's Performance Team, consisting of approximately 60 of IBM's senior leaders who run IBM business units across geographies, including the Chairman, CEO, and each Senior Vice President of the Company. Lima was exposed, as recently as April 2020, to the Performance Team's discussions of IBM's global product development and marketing strategy in Cloud and AI—which is directly applicable to the competition between IBM and Microsoft in Latin America—and confidential details about IBM's competitive plans against Microsoft.
- (c) Lima was a member of IBM's Acceleration Team, a select group of executives charged with accelerating IBM's growth through leadership initiatives to promote innovation. Lima was exposed to details about IBM's global Cloud and AI strategy and competitive

initiatives discussed at the Acceleration Team’s annual meeting in January 2020.

32. Lima also knows IBM’s confidential information regarding its active bids for business in direct competition against Microsoft. As one of many examples, just last year IBM and Microsoft competed for contracts with AT&T that span a number of business sectors. Ultimately, AT&T partnered separately with each of the companies: while AT&T agreed to enlist IBM’s expertise to modernize its Business Solutions internal software applications, which will enable migrations to the IBM Cloud,<sup>5</sup> AT&T also enlisted Microsoft to shift workloads to Microsoft’s Public Cloud.<sup>6</sup> In addition, AT&T agreed to collaborate with each company on 5G and edge computing platforms and to make use of, and or collaborate on, AI developments.<sup>7</sup> Although some aspects of the division of labor between IBM and Microsoft have been settled, many of the decisions as to which company will do what remain open—leaving Microsoft and IBM in active competition with regard to AT&T. Lima was personally involved in the signing of IBM’s contracts with AT&T and ran the team responsible for the contract deliverables. This

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<sup>5</sup> See Press Release, IBM, *IBM and AT&T Announce Multi-Year Strategic Alliance* (July 16, 2019), <https://newsroom.ibm.com/2019-07-16-IBM-And-AT-T-Announce-Multi-Year-Strategic-Alliance>.

<sup>6</sup> See Press Release, Microsoft, *AT&T and Microsoft Announce a Strategic Alliance to Deliver Innovation with Cloud, AI and 5G* (July 17, 2019), <https://news.microsoft.com/2019/07/17/att-and-microsoft-announce-a-strategic-alliance-to-deliver-innovation-with-cloud-ai-and-5g/>.

<sup>7</sup> *Id.* (“By working together on common efforts around 5G, the cloud, and AI, we will accelerate the speed of innovation and impact for our customers and our communities”) (internal citations omitted); *IBM and AT&T Announce Multi-Year Strategic Alliance*, *supra* note 5 (“The two companies will also collaborate on edge computing platforms, which will help enterprise clients capitalize on the power of 5G network speeds and the internet-connected devices and sensors at the edge of the network”); Agam Shah, *IBM Lands AT&T as Client in Cloud Deal*, Wall St. J. (July 16, 2019), <https://www.wsj.com/articles/ibm-lands-at-t-as-client-in-cloud-deal-11563317480> (“AT&T Business also will use IBM’s artificial-intelligence applications for a range of services”).

information would be very valuable to Microsoft to compete against IBM for AT&T business in Latin America, and globally.

33. Lima has been involved in the development and business strategies for a new Cloud product that IBM is launching soon: a financial services-ready Public Cloud. This product, the first of its kind, was designed by IBM specifically for financial institutions with the goal of helping these institutions address their regulatory compliance obligations, as well as their security resiliency requirements,<sup>8</sup> while moving computing workloads to the Cloud. The product will play an important role in IBM's strategy to compete against Microsoft and others in the Cloud computing market for business in the financial services sector. Documents Lima received and reviewed in his recent work for IBM confirm that this sector is a priority in IBM's efforts to win business in the Cloud computing market against competitors like Microsoft. Many confidential and competitively sensitive details about the function, operation, cost and marketing strategies of the offering have not yet been publically disclosed. Lima was involved in regular updates regarding the progress and development of the offering and also had access to strategy and development documents relating to it.

34. Lima's senior executive positions, and his participation in meetings and discussions where IBM's top leaders worldwide discussed IBM's technology and strategies to win business, has exposed him to confidential information about how IBM intends to integrate and deploy its recent acquisition of the software company Red Hat, Inc. In the largest deal in IBM's history, IBM acquired Red Hat in July 2019, with the strategic aim of increasing IBM's

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<sup>8</sup> Financial institutions face a number of regulations and statutes they must comply with in handling client data. IBM's financial services Public Cloud is designed to address these special requirements.

Cloud computing revenues and to help IBM in its competition for Cloud business against competitors like Microsoft.<sup>9</sup>

35. Red Hat specializes in open-source software—meaning that the basic code is free—that enables customers to manage their data and run their applications both in their own IT environment and on Cloud platforms hosted by outside providers such as IBM.<sup>10</sup> IBM has not disclosed many of the confidential details surrounding its future strategy for Red Hat, including how IBM will continue to develop and market Red Hat capabilities alongside IBM’s offerings portfolio and design, market, and deliver combined Red Hat and IBM capabilities to customers, and how IBM will compete against Microsoft and others. Lima knows confidential details about IBM’s strategic plans for combined Red Hat-IBM offerings both generally and with respect to specific strategic customer accounts. Lima’s knowledge about how IBM will use Red Hat’s capabilities to gain market share in Latin America would be invaluable to Microsoft. It is imperative that this competitively sensitive, confidential information remains secret.

36. Furthermore, over the course of his career at IBM, Lima developed significant relationships with IBM’s clients, particularly Latin American clients, financial services clients and global clients doing business in Latin America, and he has continued to

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<sup>9</sup> See Press Release, IBM, *IBM Closes Landmark Acquisition of Red Hat for \$34 Billion; Defines Open, Hybrid Cloud Future* (July 9, 2019), <https://newsroom.ibm.com/2019-07-09-IBM-Closes-Landmark-Acquisition-of-Red-Hat-for-34-Billion-Defines-Open-Hybrid-Cloud-Future>.

<sup>10</sup> Angus Loten, *IBM Strengthens Hybrid Cloud with Red Hat Acquisition*, Wall St. J. (July 12, 2019), <https://www.wsj.com/articles/ibm-strengthens-Hybrid-cloud-with-red-hat-acquisition-11562967857>; *IBM Closes Landmark Acquisition of Red Hat for \$34 Billion; Defines Open, Hybrid Cloud Future*, *supra* note 9 (reporting that the IBM-Red Hat proposition “will accelerate innovation by offering a next-generation Hybrid multicloud platform” allowing businesses to “securely deploy, run and manage data and applications . . . across Private clouds and multiple clouds from multiple vendors”).

cultivate those relationships and work closely with those clients in his most recent Integrated Accounts role.

37. Lima has worked with IBM's product development teams to expand IBM's market share for its products and services in Latin America. He was involved in negotiating and closing major agreements with clients to provide IBM products and services, including deals for which IBM competed directly against Microsoft. Lima also served until his resignation as IBM's primary relationship executive for several Latin and North American clients through IBM's "Partnership Executive Program." Lima knows IBM's strategic and marketing plans, pricing, and confidential details about IBM's relationship with each of these clients, all of which would be highly relevant in his intended role to run and grow Microsoft's business in Latin America.

38. Lima's knowledge of confidential information about IBM's products and services in development, and IBM's plans to win business from top clients in Latin America, particularly in Cloud—knowledge which he gained and expanded through his consecutive leadership positions at IBM—would be very valuable to Microsoft. Across various business sectors, IBM and Microsoft routinely engage in head-to-head competition for clients, whose contracts are continually up for renewal and future negotiation, making Lima's knowledge about these deals and his deep relationships with these clients particularly valuable to Microsoft. This competition is especially fierce in the Cloud computing sector, and in Latin America, where Lima's client connections are particularly strong.

#### **IBM-Microsoft Competition**

39. IBM and Microsoft compete for the same business and government customers. They market computer software and service offerings that compete directly against each other in many areas of IT, particularly in Cloud computing. Recent industry reports

identify IBM and Microsoft as among the top competitors in Cloud computing,<sup>11</sup> and specifically identify Latin America as a significant battleground for IBM and Microsoft in this sector.<sup>12</sup>

40. With only about 20% of the IT workload worldwide having been migrated to the Cloud, 80% of the market remains up for grabs. Further intensifying the battle for Cloud business, the vast majority of organizations do not simply choose one Cloud provider, but instead run multiple Cloud programs. This means that although IBM may have one or more Cloud computing contracts with a client, they are not guaranteed other Cloud computing contracts with that same client. This is especially true given the recent rise in popularity of open source software. Moreover, all deals, in the Cloud computing sector and otherwise, are subject to future renewal and renegotiation—perpetually leaving open the possibility that Microsoft could poach a current IBM contract.

41. Outside of Cloud computing, recent industry reports identify numerous additional areas of competition between IBM and Microsoft. For example, IBM and Microsoft are among the top competitors in Data Science and Machine Learning Platforms,<sup>13</sup> Cloud-AI

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<sup>11</sup> See, e.g., Gartner, *Magic Quadrant for Cloud Infrastructure as a Service, Worldwide* (July 16, 2019) (listing IBM as a “niche player” and Microsoft as a “leader” among providers of Cloud infrastructure as a service); see also Statista, *Distribution of Cloud Computing Market Revenues Worldwide from 2015 to June 2019, by vendor* (last visited May 26, 2020), <https://www.statista.com/statistics/540511/worldwide-cloud-computing-revenue-share-by-vendor/#statisticContainer> (demonstrating that Microsoft and IBM were among the largest market share holders among Cloud computing vendors worldwide).

<sup>12</sup> See, e.g., Alcides Leon, *Cloud in LATAM: An Inside Look at Growth Drivers, Nearshore Americas* (April 3, 2019), <https://nearshoreamericas.com/cloud-market-latin-america-growth/>; ICloud, *Computing Market in Latin America 2016-2020*, Business Wire, (Aug. 17, 2017), <https://www.businesswire.com/news/home/20170801005756/en/Cloud-Computing-Market-Latin-America-2016-2020-->.

<sup>13</sup> See, e.g., Gartner, *Magic Quadrant for Data Science and Machine Learning Platforms* (Feb. 11, 2020) (listing IBM as a “challenger” and Microsoft as a “visionary” after evaluating vendors of data science and machine learning platforms).



Developer Services,<sup>14</sup> Insight Engines,<sup>15</sup> Access Management,<sup>16</sup> Enterprise Integration Platform Services,<sup>17</sup> Enterprise Agile Planning Tools,<sup>18</sup> Application Performance Monitoring,<sup>19</sup> Streaming Analytics,<sup>20</sup> Operational Database Management Systems,<sup>21</sup> Data Integration Tools,<sup>22</sup> Content Services Platforms,<sup>23</sup> Full Life Cycle Application Programming Interface Management,<sup>24</sup>

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<sup>14</sup> See, e.g., Gartner, *Magic Quadrant for Cloud AI Developer Services* (Feb. 24, 2020) (listing IBM and Microsoft as “leaders” in the Cloud-hosted AI services sector).

<sup>15</sup> See, e.g., Gartner, *Magic Quadrant for Insight Engines* (Sept. 17, 2019) (listing IBM as a “leader” and Microsoft as a “niche player” in the insight engine space).

<sup>16</sup> See, e.g., Gartner, *Magic Quadrant for Access Management, Worldwide* (Aug. 12, 2019) (listing IBM and Microsoft as “leaders” in the access management market).

<sup>17</sup> See, e.g., Gartner, *Magic Quadrant for Enterprise Integration Platform as a Service* (April 23, 2019) (listing IBM as a “visionary” and Microsoft as a “leader” among EiPaaS providers).

<sup>18</sup> See, e.g., Gartner, *Magic Quadrant for Enterprise Agile Planning Tools* (April 21, 2020) (listing IBM as a “niche player” and Microsoft as a “challenger” among vendors of EAP tools).

<sup>19</sup> See, e.g., Gartner, *Magic Quadrant for Application Performance Monitoring* (April 22, 2020) (listing IBM as a “niche player” and Microsoft as a “challenger” in the APM market).

<sup>20</sup> See, e.g., Forrester, *The Forrester Wave: Streaming Analytics Q3 2019* (Sept. 23, 2019) (including IBM and Microsoft in a list of 11 evaluated vendors in the streaming analytics sector).

<sup>21</sup> See, e.g., Gartner, *Magic Quadrant for Operational Database Management Systems* (Nov. 25, 2019) (listing IBM as a “visionary” and Microsoft as a “leader” in the operational database management systems market).

<sup>22</sup> See, e.g., Gartner, *Magic Quadrant for Data Integration Tools* (Aug. 1, 2019) (listing IBM as a “leader” and Microsoft as a “challenger” in the market for data integration tools).

<sup>23</sup> See, e.g., Gartner, *Magic Quadrant for Content Services Platforms* (Oct. 30, 2019) (listing IBM and Microsoft as “leaders” in the content services platforms market).

<sup>24</sup> See, e.g., Gartner, *Magic Quadrant for Full Life Cycle API Management* (Oct. 9, 2019) (listing IBM as a “leader” and Microsoft as a “Niche Player” among vendors in the full life cycle API management market).



Unified Endpoint Management Tools,<sup>25</sup> Analytics and Business Intelligence Platforms,<sup>26</sup> Application Release Orchestration Tools,<sup>27</sup> Multiexperience Development Platforms,<sup>28</sup> and Disaster Recovery.<sup>29</sup>

42. Microsoft is listed in IBM's financial disclosures as a competitor to various IBM business segments. More specifically, Microsoft is listed as a "broad based competitor" to IBM's Global Business Services, among its list of "principal competitors" in the Cloud and cognitive software market, and as a competitor to IBM's Global Technology Services and Systems businesses.<sup>30</sup> Likewise, IBM is listed in Microsoft's financial disclosures as a competitor in server applications; server operating systems and applications; enterprise-wide computing systems; database, business intelligence, and data warehousing solutions; system management solutions; products for software developers; and Azure, Microsoft's Cloud computing offering.<sup>31</sup>

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<sup>25</sup> See, e.g., Gartner, *Magic Quadrant for Unified Endpoint Management Tools* (Aug. 6, 2019) (listing IBM and Microsoft as "leaders" among unified endpoint management tool vendors).

<sup>26</sup> See, e.g., Gartner, *Magic Quadrant for Analytics and Business Intelligence Platforms* (Feb. 11, 2020) (listing IBM as a "niche player" and Microsoft as a "leader" in the analytics and business intelligence platform market).

<sup>27</sup> See, e.g., Gartner, *Magic Quadrant for Application Release Orchestration* (Oct. 7, 2019) (listing IBM as "niche player" and Microsoft as "challenger" in the market for application release orchestration tools).

<sup>28</sup> See, e.g., Gartner, *Magic Quadrant for Multiexperience Development Platforms* (July 10, 2019) (listing IBM as a "niche player" and Microsoft as a "challenger" in the multiexperience development platform market).

<sup>29</sup> See, e.g., Gartner, *Magic Quadrant for Disaster Recovery as a Service* (June 5, 2019) (listing IBM as a "visionary" and Microsoft as a "leader" in the disaster recovery as a service market).

<sup>30</sup> International Business Machines Corp., Annual Report (Form 10-K) 7-8 (Feb. 25, 2020).

<sup>31</sup> Microsoft Corp., Annual Report (Form 10-K) 7-9 (Aug. 1, 2019).

43. Lima's own statements confirm that Microsoft was a top competitor for Lima in both his GTS role and in his Integrated Accounts role at IBM, stating that Microsoft competes for business in all of IBM's largest client accounts.

**Lima's Noncompetition Agreement with IBM**

44. Precisely because of his exposure to trade secrets and highly confidential and commercially sensitive information, Lima was one of IBM's senior executives who the Company asked to sign a Noncompetition Agreement, to restrict the potential disclosure of trade secrets and confidential IBM information in the event that he left the Company.

45. Lima executed his first Noncompetition Agreement with IBM on August 6, 2013. When he returned to IBM in 2016, he executed another Noncompetition Agreement with IBM. When he relocated to the United States, he executed his most recent Noncompetition Agreement with IBM on December 3, 2019.

46. In the 2019 Noncompetition Agreement, Lima acknowledged and agreed that:

during [his] employment with IBM and for twelve (12) months following the termination of [his] employment . . . : (i) [he] will not directly or indirectly, within the Restricted Area, Engage in or Associate with (a) any Business Enterprise or (b) any competitor of the Company, if performing the duties and responsibilities of such engagement or association could result in [his] (1) intentionally or unintentionally using, disclosing, or relying upon IBM Confidential Information to which [he] had access by virtue of [his] job duties or other responsibilities with IBM or (2) exploiting customer goodwill cultivated in the course of [his] employment with IBM. . . and (ii) [he] will not directly or indirectly solicit, for competitive business purposes, any actual or prospective customer of the Company with which [he was] directly or indirectly involved as part of [his] job responsibilities during the last twelve (12) months of [his] employment with IBM. (2019 Noncompetition Agreement § 1(e).)

47. The Noncompetition Agreement provides the following definitions for the defined terms in the foregoing provision:

(a) “Restricted Area” is defined as “any geographic area in the world in which [he] worked or for which [he] had job responsibilities, including supervisory responsibilities, during the last twelve (12) months of [his] employment with IBM.” (*Id.* § 2(f).)

(b) “Engage in or Associate with” is defined to mean, among other things, acting as an “associate, employee, member, consultant, or contractor.” (*Id.* § 2(d).)

(c) “Business Enterprise” is defined as “any entity that engages in, or owns or controls an interest in any entity that engages in, competition with any business unit or division of the Company in which [he] worked at any time during the three (3) year period prior to the termination of [his] employment.” (*Id.* § 2(a).)

(d) “IBM Confidential Information” is defined as including, among other things, information about “the Company’s selling, manufacturing, and servicing methods and business techniques, implementation strategies . . . vendor and product information, customer and prospective customer lists, other customer and prospective customer information, client data, global strategic plans, marketing plans, information about the Company’s management techniques and management strategies . . . information regarding the development status of specific Company products, assessments of the global competitive landscape of the industries in which the Company competes . . . [and] financial status and plans.” (*Id.* § 2(e).)

48. Thus, Lima agreed in the Noncompetition Agreement that, for a period of one year following the termination of his employment from IBM, he would not work for any competitor of IBM in any geographic area in the world for which he had job responsibilities in the last 12 months of his employment with IBM if such employment could result in the

intentional or unintentional use or disclosure of IBM Confidential Information to which he was exposed in his IBM employment.

49. Additionally, in the Noncompetition Agreement, Lima agreed and acknowledged that:

(a) “the business in which IBM and its affiliates . . . are engaged is intensely competitive” (*Id.* § 1(b));

(b) his “employment by IBM . . . require[d] that [he] have access to, and knowledge of, IBM Confidential Information” (*Id.*);

(c) “the Company would suffer irreparable harm if [he failed] to comply with [the noncompetition and the nonsolicitation covenants]” (*Id.* § 3.); and

(d) “the restrictions set forth in [the noncompetition and the nonsolicitation covenants] are reasonable as to geography, scope, and duration.” (*Id.*)

**Lima Violates the Noncompetition Agreement  
by Accepting Employment with Microsoft  
As Corporate Vice President, Latin America**

50. Notwithstanding the covenants in his Noncompetition Agreement, Lima informed IBM on May 18, 2020 that he intended to accept an offer to join Microsoft as Corporate Vice President, Latin America. Lima’s last day at IBM was May 20, 2020.

51. In response, IBM raised concerns, both with Lima’s legal counsel and Microsoft’s legal counsel, regarding the Noncompetition Agreement Lima entered into with IBM and his confidentiality obligations to the Company. As a result of discussions among counsel for IBM, counsel for Microsoft, and counsel for Lima, Microsoft agreed that it would not permit Lima to commence employment with Microsoft prior to June 19, 2020.

52. Counsel for Microsoft informed IBM that as the Corporate Vice President, Latin America, Lima will be responsible for setting the direction for the region’s product and

services portfolio in alignment with global strategy, including responsibility for Microsoft's overall revenues and profits in Latin America. Lima will work with Microsoft's industry sector leaders and regional managers to maintain various targets, such as budget and headcounts, and ensure that Microsoft's Latin America business is aligned with Microsoft's global business. Lima would also be responsible for the overall strategy and direction for the subsidiary Countries, Commercial Partner, Customer Success, Marketing & Operations, Enterprise Commercial and Public Sector organizations. The Corporate Vice President has Latin America-wide governance and reporting responsibility, meaning Lima would be the ultimate supervisor for all of Microsoft's executives in the region. He will also act as an ambassador for Microsoft in Latin America, focused on corporate citizenship and building brand equity.

53. As Microsoft's Corporate Vice President for Latin America, Lima will report to the Executive Vice President of Global Sales, Marketing, and Operations, Jean-Philippe Courtois. Lima's direct reports will include Country and Multi-Country General Managers as well as the Sales, Marketing and Operations Vice President.

54. Just as they were vital to his role at IBM, the IBM confidential information and competitive business secrets Lima knows by virtue of his responsibilities in each of his recent roles—as IBM General Manager, Latin America; GTS Manager, North America; General Manager, Integrated Accounts; and a member of the Performance Team and Acceleration Team—will all be highly relevant and valuable to these Microsoft strategy, planning and decision-making responsibilities.

55. Lima poses a particularly competitive threat to IBM, not merely because he knows the Company's trade secrets, but because he has developed relationships with significant IBM customers and potential customers at IBM's expense and on the strength of

IBM's goodwill, products, and services. Throughout his tenure at IBM, Lima has had significant exposure to Latin American clients and IBM's confidential Latin American business strategy.

56. The job that Lima intends to take at Microsoft is thus in direct competition with the role and responsibilities that he was performing at IBM. Lima has had significant exposure to IBM's most important clients, product development, and business strategy in the Latin America region, including in the highly competitive Cloud computing market.

57. Now, Lima intends to move to a strategic Latin America role at one of IBM's top competitors, Microsoft. His proposed role at Microsoft would involve him in the development of competitive strategies, and the cultivation and expansion of client relationships, directly in competition with IBM. Lima's in-depth knowledge of IBM's important clients in Latin America, as well as its confidential business strategies and plans, would provide a distinct and unfair competitive advantage to Microsoft.

**IBM's Right to Rescind Long-Term Incentive Awards It Provided to Lima**

58. As recently as June 1, 2019, Lima accepted awards of IBM stock options, Restricted Stock Units, and Performance Share Stock Units under IBM's 1999 Long-Term Performance Plan, as amended through August 1, 2007 ("LTTP"). (The LTTP Prospectus is attached hereto as **Exhibit B**.) Lima's equity awards also were governed by a document titled "Terms and Conditions of Your Equity Award: Effective June 1, 2019" (the "Terms and Conditions") (attached hereto as **Exhibit C**).

59. The equity awards that Lima received under the LTTP were in addition to, and not part of, the salary he received for his work at IBM.

60. Under the LTTP, equity awards are subject to cancellation and rescission in certain circumstances, and any exercise, payment or delivery pursuant to a rescinded award is

subject to repayment. In particular, the awards may be canceled and rescinded if the participant engages in “Detrimental Activity,” as defined in the Plan.

61. Detrimental Activity consists of eight categories of conduct, including, among others:

- (a) the rendering of services for any organization or engaging directly or indirectly in any business which is or becomes competitive with the Company; [and]
- (b) any other conduct or act determined to be injurious, detrimental or prejudicial to any interest of the Company.

62. Lima’s plan to work for Microsoft constitutes Detrimental Activity under the LTPP, triggering IBM’s right to rescind and recover awards granted to him in the prior 12 months.

63. Lima had the choice each year whether to accept his equity awards. Upon acceptance of the awards in June 2019, he agreed that he understood that “IBM may cancel, modify, rescind, suspend, withhold or otherwise limit or restrict this Award in accordance with the terms of the Plan, including, without limitation, canceling or rescinding this Award if [he] render[s] services for a competitor prior to, or during the Rescission Period. [He] understand[s] that the Rescission Period that has been established is 12 months.” (A copy of Lima’s “Long-Term Incentive Award Acceptance Information” is attached hereto as **Exhibit D.**)

64. In the Terms and Conditions to the LTPP, Lima acknowledged and agreed that if he were to violate the prohibition on direct or indirect solicitation of IBM customers, “the Company would suffer irreparable harm” and that “the Company will be entitled to any appropriate relief including money damages, equitable relief and attorneys’ fees.” (**Exhibit C** p. 8.)

65. The Terms and Conditions also require Lima to pay “all costs and expenses incurred by the Company” in a successful action to enforce the terms of the LTPP, “including reasonable attorneys’ fees.” (*Id.* p. 6.)

66. The stock options that Lima exercised and Restricted Stock Units that were released to him in the 12 months prior to his resignation and announcement of his intent to join Microsoft total approximately \$1,285,417.

**COUNT I — Breach of Noncompetition Agreement**

67. IBM repeats and realleges, as if fully set forth herein, the allegations of Paragraphs 1 through 66 above.

68. The Noncompetition Agreement is an enforceable agreement that imposes upon Lima contractual obligations.

69. IBM has complied with all material terms of this agreement.

70. Lima has breached the terms of this agreement by, among other things, accepting a position as Corporate Vice President, Latin America of Microsoft without waiting for expiration of the one-year non-compete period to which he expressly agreed.

71. As Lima agreed in the Noncompetition Agreement, if he is not enjoined from working at Microsoft as Corporate Vice President, Latin America until May 20, 2021, and thereby violating his Noncompetition Agreement, IBM will be irreparably injured.

72. In view of the similarity of Lima’s current and prior positions at IBM to his proposed role at Microsoft, he will inevitably (if inadvertently) make use of and/or disclose IBM trade secrets and other confidential and proprietary IBM information in performing his proposed role at Microsoft.



73. IBM will also be harmed if Lima violates the nonsolicitation covenants in the Noncompetition Agreement.

74. In these circumstances, IBM is entitled to an injunction to prevent such irreparable injury. IBM is also entitled to recover money damages to the extent that Lima is not enjoined from violating his agreement.

**COUNT II — Misappropriation of Trade Secrets**

75. IBM repeats and realleges, as if fully set forth herein, the allegations of Paragraphs 1 through 74 above.

76. IBM possesses certain trade secrets and confidential information with which Lima is familiar, and which Lima has a common law duty not to disclose outside of IBM.

77. The Noncompetition Agreement is an enforceable agreement that imposes upon Lima contractual obligations, including the obligations of nondisclosure with respect to IBM's confidential information.

78. If he is permitted to work for Microsoft, Lima will inevitably (if inadvertently) use and/or disclose IBM trade secrets for his own benefit and for the benefit of Microsoft.

79. As an unavoidable result of Lima's impending misappropriation of IBM trade secrets in violation of his common law and contractual duties, IBM will be damaged.

**COUNT III — Declaratory Judgment: Rescission of Equity Award**

80. IBM repeats and realleges, as if fully set forth herein, the allegations of Paragraphs 1 through 79 above.

81. By accepting employment at Microsoft in competition against IBM, Lima has engaged in "Detrimental Activity" under the LTPP agreement, triggering IBM's right to rescind and demand repayment of equity awards granted to him in the prior 12 months.

82. The LTPP agreement is an enforceable agreement, and IBM has performed all of its material obligations under the agreement.

83. IBM has informed Lima of this claim. Lima has refused and, on information and belief, will continue to refuse to return and repay his equity awards, as required by the LTPP agreement.

84. IBM does not have an adequate, alternative remedy in another form of action.

85. Accordingly, IBM is entitled to a declaratory judgment confirming its right to rescind and demand repayment of Lima's equity awards.

#### **PRAYER FOR RELIEF**


WHEREFORE, plaintiff IBM demands judgment seeking relief against defendant Rodrigo Lima as follows:

- (a) A preliminary injunction and permanent injunction ordering Lima to refrain from: (i) breaching the terms of his Noncompetition Agreement with IBM or the Terms and Conditions of the equity awards he accepted from IBM; (ii) commencing his employment with Microsoft as Corporate Vice President, Latin America or in any similar capacity until May 20, 2021; (iii) directly or indirectly soliciting, for competitive business purposes, any IBM customer with which Lima was directly or indirectly involved as part of his job responsibilities during the last 12 months of his employment with IBM prior to May 20, 2021; or (iv) directly or indirectly hiring, soliciting, making an offer to, or attempting or participating or assisting in any effort to hire, solicit, or make an offer to any IBM employee to be employed or to perform services outside of the Company prior to May 20, 2022;
- (b) Declaring that IBM is entitled to rescind and demand repayment of the equity awards granted to Lima in the 12 months prior to his accepting employment with Microsoft;
- (c) Awarding IBM its attorneys' fees, costs, and disbursements incurred as a result of this action;

- (d) Awarding IBM monetary damages in an amount sufficient to compensate the Company for Lima's breaches of contract, together with rescission of any LTPP awards Lima has received from IBM within the last 12 months, and any other compensation or benefits that IBM is entitled to rescind or recoup; and
- (e) Awarding IBM such further relief as the Court deems just and proper.

Dated: New York, New York  
June 15, 2020

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: 

Robert A. Atkins  
Liza Velazquez  
Pietro J. Signoracci

1285 Avenue of the Americas  
New York, New York 10019-6064  
(212) 373-3000  
ratkins@paulweiss.com  
lvelazquez@paulweiss.com  
psignoracci@paulweiss.com

*Attorneys for Plaintiff  
International Business Machines Corporation*